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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

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STATE TREASURER

**NOTICE TO TAXPAYERS REGARDING
Kmart MICHIGAN PROPERTY SERVICES LLC v DEP'T OF TREASURY,
THE SINGLE BUSINESS TAX, RAB 1999-9, AND RAB 2000-5**

I. Impact of *Kmart Michigan Property Services LLC v Dep't of Treasury*

On September 28, 2009, the Michigan Supreme Court denied leave to appeal the decision of the Michigan Court of Appeals in *Kmart Michigan Property Services LLC v Dep't of Treasury*¹ ("*Kmart*"). At issue in *Kmart* was whether Kmart Michigan Property Services LLC ("KMPS"), a single member limited liability company disregarded for federal tax purposes, was permitted to file a return separate from its owner, Kmart Corporation, contrary to RAB 1999-9, which required KMPS to instead file as a division of its owner. The Court of Appeals found in favor of KMPS, holding:

KMPS was required to file a SBT return, regardless of its classification as a disregarded entity for federal tax purposes, because KMPS fit within the statutory definition of a "person" conducting business activity and the SBTA required all persons conducting business activity in the state to file a SBT return. Therefore, the SBTA does not support the requirement of RAB 1999-9 that an organization that is a disregarded entity for federal tax purposes for a given taxable period must also file as a disregarded entity for state tax purposes.²

In accordance with *Kmart* and consistent with a series of cases³ that require the Michigan Department of Treasury (the "Department") to give judicial decisions full retroactive effect – even in the presence of contrary guidance issued by the Department prior to the date of the decision – **the Department concludes that *Kmart* will be applied to all open tax years.**

Those portions of RAB 1999-9 and RAB 2000-5 dealing with the requirement that an entity disregarded for federal tax purposes for a given taxable period must also file as a disregarded entity for state tax purposes are invalid to the extent inconsistent with *Kmart*.

II. Administrative Requirements for Taxpayers Subject to *Kmart*

Requirement to File/Amend. Pursuant to *Kmart*, persons that are disregarded entities for federal tax purposes that filed as a branch, division, or sole proprietor of their owner for SBT purposes ("previously disregarded entities") must now file a separate SBT return for all open tax

¹ 283 Mich App 647 (2009), lv den 772 NW2d 421 (2009).

² Id.

³ *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286 (1998); *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441 (2004); *JW Hobbs v Dep't of Treasury*, 268 Mich App 38 (2005); *Int'l Home Foods Inc v Dep't of Treasury*, 477 Mich 983 (2007).

periods. Previously disregarded entities are considered non-filers for statute of limitations purposes under MCL 205.27a. Consequently, returns must be filed for all tax years for which the previously disregarded entity exceeds the filing threshold.⁴

Persons that previously filed SBT returns that included one or more previously disregarded entities must amend their returns for all open periods. These persons may not amend returns beyond the statute of limitations set forth under MCL 205.27a.

All persons required to file or amend a return under *Kmart* and this Notice must do so by September 30, 2010.

Penalties and Interest. Interest under MCL 205.23 and MCL 205.24 is due for any deficiencies in tax payments and shall be added to the tax from the time the tax was originally due. Interest on refunds due to amended returns or returns filed by previously disregarded entities shall be calculated and added to the refund commencing 45 days after the claim is filed.⁵

Failure to file penalties under MCL 205.24 will be waived for all returns filed and paid by September 30, 2010. Penalty will be assessed against any previously disregarded entity that fails to file a required return by September 30, 2010.

Registration. Previously disregarded entities that do not have a Federal Employer Identification Number ("FEIN") or Michigan Treasury Assigned Number ("TR") must register with the Department before filing an SBT return. Taxpayers are encouraged to register online at www.michigan.gov/businessstaxes. The web site provides information on obtaining an FEIN, which is required to submit taxes through e-file. Returns received without a registered account number will be subject to delayed processing.

Filing Threshold. In general, persons engaged in business activity in Michigan and whose apportioned or allocated gross receipts are \$350,000 or more must file an annual return. However, a previously disregarded entity is also a member of a group of entities under common control⁶ with its parent. An affiliated group, a controlled group of corporations, or a group of entities under common control must sum its members' apportioned or allocated gross receipts on Form C-8010AGR, *SBT Adjusted Gross Receipts for Controlled Groups*, to determine if members of the group need to file. Members whose apportioned or allocated gross receipts are less than \$100,000 are not included and are not required to file an SBT return. If the sum of the members' apportioned or allocated gross receipts are \$350,000 or more, all members with apportioned or allocated gross receipts that equal \$100,000 or more must file an annual return. Members whose apportioned or allocated gross receipts are less than \$100,000 must include their business activity when computing a small business credit on Form C-8009, *SBT Allocation of Statutory Exemption, Standard Small Business Credit and Alternate Tax for Members of Controlled Groups*. These members must also include their apportioned or allocated gross receipts to determine the group's Investment Tax Credit adjusted gross receipts percentage.

Completing and Filing the Required Return. A previously disregarded entity who exceeds the filing threshold must file Form C-8000, *Single Business Tax Annual Return* and all supporting

⁴ RAB 1999-9 was effective January 1, 1997.

⁵ MCL 205.30.

⁶ RAB 1989-48.

schedules. A member of a group of entities under common control may not file Form C-8044, *Single Business Tax Simplified Return*.

Previously disregarded entities must identify their Organization Type before their SBT return will be processed. Valid choices include *Individual*, *Limited Liability Company-Corporation*, *S Corporation/LLC S Corporation*, and *Partnership/LLC-Partnership*. Previously disregarded entities should select the Organization Type under which its parent filed its return. For example, a previously disregarded limited liability company whose single member (parent) is a corporation should select the Organization Type: *Limited Liability Company-Corporation*. A previously disregarded QSub should select the Organization Type: *S Corporation/LLC S Corporation*.

Previously disregarded entities must attach to each return a corresponding *pro forma* federal return and a statement identifying the parent organization under which it was previously included.

Entities amending returns to remove previously disregarded entities must also include with each amended return a corresponding *pro forma* federal return and a statement identifying each previously disregarded entity that had been included in the original return.

All returns and amended returns filed pursuant to *Kmart* and this Notice must be sent to the following address:

With or Without Payment:
Michigan Department of Treasury
P.O. Box 30059
Lansing, MI 48909

This Notice was issued on February 5, 2010.